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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G045849
v.	(Super. Ct. No. 09HF1923)
STEPHEN JACOB WRUBEL,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed in part, reversed in part, and remanded.

Doreen B. Boxer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Stephen Jacob Wrubel was convicted of domestic battery with a prior injury and violating a restraining order. After his probation was revoked, he was sentenced to four years on the domestic battery count. The trial court purported to "suspend" his sentence on the second count, but as both parties agree, such a sentence is unauthorized. The parties disagree, however, on what should become of that count. The best course of action here is simply to remand the matter for resentencing on that count.

I

FACTS

In June 2009, the victim, defendant's wife, called Costa Mesa police after an incident in which she alleged defendant threatened to kill her and hit her in the back of the head with a closed fist. After she fell to the ground, defendant hit her again. The victim also reported prior incidents of violence to the police. Defendant was arrested, a handgun was confiscated from the residence, and defendant was served with an emergency protective order. At some point, the protective order was modified to allow defendant and the victim to have peaceful contact.

One afternoon in October 2009, police responded to an emergency call about a domestic violence incident. The victim reported that she had returned home from running errands to find defendant watching television, but their two young children were missing. She asked her husband where the children were, but he would not answer. After she became more persistent, defendant finally said he had taken the children to their grandfather's home. The victim asked why, and defendant first ignored her and then began yelling at her, telling her to leave the house. He then threw what appeared to be a remote control or cell phone at her, hitting the bridge of her nose. She fell backward and started bleeding before running to a neighbor's house to call the police.

On November 6, 2009, the Orange County District Attorney filed an amended complaint charging defendant with domestic battery causing injury with a prior

conviction for violence, a felony (Pen. Code,[1] § 273.5; count one), and violation of a protective order, a misdemeanor (§ 166, subd. (c)(1)). Shortly thereafter, defendant pled guilty to both counts as charged and requested immediate sentencing. He was sentenced to five years of formal probation, the conditions of which included 150 days in custody.

In July 2010, the court found defendant had violated probation by being terminated from a required batterer's treatment program. Probation was reinstated with an order to serve 90 days in custody.

In June 2011, a probation search revealed a firearm, ammunition, various other weapons including a machete and sword-cane, a substance which tested positive for methamphetamine and paraphernalia, and writings with obscenities and epithets against the victim. After a hearing, the court found defendant in violation of probation. Probation was terminated, and the court sentenced defendant to the middle term of four years on count one. Sentence on count two was suspended. Defendant now appeals.

II

DISCUSSION

The only issue on appeal is the propriety of the sentence on count two, the misdemeanor violation of the protective order. At the sentencing hearing, when the clerk indicated to the court that sentence had not been passed on count two, the court stated: "Suspend the misdemeanor count."

Defendant argues, and respondent agrees, that suspending sentence on count two was unauthorized. We also agree. Once the trial court has denied probation, it has no power to "suspend" a sentence. (*People v. Superior Court* (*Roam*) (1999) 69 Cal.App.4th 1220, 1230.) If the court does suspend a sentence, it is deemed an informal grant of probation (*ibid.*), which, given the trial court's explicit determination that

[1] Subsequent statutory references are to the Penal Code.

probation was denied, was obviously not the case here. Therefore, a suspended sentence on count two was unauthorized.

Defendant also argues that sentence on count two should have been stayed pursuant to section 654, because both the assault and violation of the protective order were based on a single objective or intent. Section 654, subdivision (a) states: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 therefore bars multiple punishment when a defendant is convicted of two or more offenses that are incident to one objective. (*Neal v. State of California* (1960) 55 Cal.2d 11 (*Neal*); *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective of the actor*. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal, supra*, 55 Cal.2d at p. 19, italics added.)

Respondent argues that a separate sentence on count two would not have been barred by section 654, because "[t]he violation of the protective order on October 31, 2009, occurred prior to any domestic violence and consisted of [defendant] being in the victim's home and availing himself of contact with her. Thus, the objective of count 2 was simply to disobey the order and have contact with the victim. [¶] In contrast, the objective of count 1 was to harm the victim." This argument, as defendant's reply brief points out, appears to be based on the erroneous premise that defendant was not permitted any contact with the victim, while in fact he was allowed to have "peaceful contact" with her.

Respondent then argues it was not the court's intent to impose additional punishment, and on remand the court "would most likely deny probation and sentence

[defendant] to credit for time served on count 2 or order a concurrent sentence of 365 days or less . . . ." Respondent asks us to choose one of these options and modify the judgment accordingly.

We conclude that doing so would be inappropriate, in this case. Whether section 654 applies is generally a question of fact (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5) and "the trial court's finding will be upheld on appeal if it is supported by substantial evidence. [Citations.]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We cannot evaluate whether substantial evidence exists for a ruling the trial court simply did not make. While it is certainly possible that when the trial court said "suspend" it simply misspoke and intended to stay the sentence pursuant to section 654, we hesitate to second-guess the trial court in such a manner. The obvious solution is to remand the matter for resentencing on count two.

III

DISPOSITION

Defendant's sentence on count two is reversed, and the matter is remanded for resentencing on that count only. In all other respects, the judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.